

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 5, 2006

ROSE MARIE HERNANDEZ v. STATE OF TENNESSEE

Appeal from the Circuit Court for Bedford County
No. 10419 Lee Russell, Judge

No. M2006-01123-CCA-R3-PC - Filed February 16, 2007

The Appellant, Rose Marie Hernandez, appeals the dismissal of her petition for post-conviction relief by the Bedford County Circuit Court. Hernandez pled guilty to seventy counts of forgery, which the trial court merged into thirty-five convictions of forgery, and received an effective sentence of thirty-three years and six months in the Department of Correction as a Range III persistent offender. On appeal, she asserts that her pleas were not knowingly and voluntarily entered due to the ineffective assistance of counsel. Hernandez argues that counsel was deficient in: (1) failing to adequately consult with her and failing to obtain and review discovery material; and (2) “misinform[ing] [her] about the sentencing and enhancing process.” Following review, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J.C. McLIN, JJ., joined.

Karla D. Ogle, Fayetteville, Tennessee, for the Appellant, Rose Marie Hernandez.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; and Michael D. Randles, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The facts of the case, as established in the direct appeal of the Appellant’s sentences, are as follows:

[I]n December of [2002], Mr. Donald Gibbs went to the sheriff’s department to report that some of his checks had been stolen and apparently forged. A joint investigation was conducted by the [Bedford County] sheriff’s department and [the Shelbyville] police department[, a]nd they developed an investigation that led them to the [Appellant]. They went to some merchants where the checks had been forged

with a photo lineup to include the picture of the [Appellant,] and [] several of the merchants picked the [Appellant] as having been the person that passed the checks. They then interviewed the [Appellant] and she admitted she took his checkbook and she admitted to forging and passing a number of the checks.

State v. Rose Marie Hernandez, No. M2003-01756-CCA-R3-CD (Tenn. Crim. App. at Nashville, Dec. 16, 2004). A Bedford County grand jury indicted the Appellant for seventy counts of forgery, thirty-five for making forged checks and thirty-five for passing them, and one count of custodial interference. *Id.* The Appellant then entered “open pleas” to the indicted offenses, resulting in guilty pleas to seventy counts of forgery, with the custodial interference charge being dismissed. *Id.* The trial court merged the thirty-five counts of making forged checks with the thirty-five counts of passing them for a total of thirty-five convictions of forgery. *Id.* Following a sentencing hearing, the trial court sentenced the Appellant to five years and six months for each of her thirty-five convictions. *Id.* The court then ordered that six of the convictions be served consecutively to each other but concurrently with the remaining twenty-nine convictions, resulting in an effective sentence of thirty-three years and six months to be served in the Department of Correction as a Range III persistent offender. *Id.* The sentences were affirmed on direct appeal. *Id.*

On July 15, 2005, the Appellant filed a petition for post-conviction relief alleging that her guilty pleas were involuntarily entered due to the ineffective assistance of counsel. Specifically, the Appellant asserted that: (1) trial counsel did not properly advise her regarding alternative sentencing, ranges of punishment, or enhancement factors to be considered by the court; and (2) that “she was confused by the pleas she entered due to the lack of communication and explanation from her lawyer.” A post-conviction hearing was held on October 31, 2005, at which only trial counsel and the Appellant testified.

The Appellant testified that she thought trial counsel had only met with her three times for about thirty minutes on each occasion. She also stated that she did not remember trial counsel reviewing any discovery materials with her. The Appellant testified that there was confusion with regard to the aggregate length of the sentences and sentence range that the State was offering under the proposed plea agreement. However, the Appellant admitted that she informed trial counsel to negotiate the best possible plea agreement he could, because she was guilty. She further admitted that it was her decision to enter an “open plea” and have the judge determine her sentence. She also acknowledged that trial counsel explained to her that the trial court would determine the length of her sentences and the percentage of the sentence which she would serve.

Trial counsel testified that he met with the Appellant each time she came to court and that he conveyed the State’s plea offer to her, which the Appellant rejected. He felt that he had adequately consulted with the Appellant regarding her case and the State’s plea offer. During his meetings with the Appellant, he discussed the information he had received from the State pursuant to his discovery request. The Appellant always admitted writing the checks and explained to counsel that she had forged the checks in order to buy drugs. During the period the Appellant was committing the forgeries, she was on parole. Additionally, the Appellant’s prior criminal history

included twenty prior felony convictions. Trial counsel stated that he advised the Appellant that her options were to: accept the State's offer; keep negotiating; plead guilty and have a sentencing hearing; or go to trial. He believed that the Appellant understood these options.

The post-conviction court dismissed the Appellant's petition, by written order, on March 27, 2006. On May 8, 2006, the Appellant filed notice of appeal.

Analysis

Initially, as the State argues, we are constrained to note that the Appellant has failed to file a timely notice of appeal in this case. The Rules of Appellate Procedure require that a notice of appeal be filed within thirty days after the entry of judgment from which a defendant is appealing. Tenn. R. App. P. 4(a). Here, the order dismissing the Appellant's petition was filed on March 27th, and the notice of appeal was not filed until May 8th, more than thirty days later.¹ Clearly, the Appellant has failed to comply with the rule and offers no explanation for the untimely filing. However, this court may waive an untimely filing of a notice of appeal "in the interest of justice." *State v. Scales*, 767 S.W.2d 157, 158 (Tenn. 1989); *see also* Tenn. R. App. P. 3(e) & 4(a). In determining whether waiver is appropriate, this court should consider the nature of the issues for review, the reasons for the delay in seeking relief, and other relevant factors presented in each case. *Larry Coulter v. State*, No. M2002-02688-CCA-R3-PC (Tenn. Crim. App. at Nashville, Oct. 21, 2003). Despite the fact that the issue of waiver is not addressed by the Appellant and no explanation for the failure to timely file is advanced, we conclude that justice is best served by reviewing the Appellant's issues upon the merits. Accordingly, the untimely filing of the notice of appeal document is waived.

On appeal, the Appellant asserts that she was denied the effective assistance of counsel, and, as a result, her guilty pleas were not entered knowingly and voluntarily. Specifically, the Appellant asserts that trial counsel was deficient in: (1) failing to meet with her a sufficient number of times to adequately discuss the case and failing to obtain discovery and review it her; and (2) misinforming her about the "sentencing and enhancing process" in an "open plea" to the indicted offenses. In order to succeed on a post-conviction claim, the Appellant bears the burden of showing, by clear and convincing evidence, the allegations set forth in her petition. T.C.A. § 40-30-110(f) (2003).

In evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that, "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). In making this determination, the reviewing court must look to the totality of the circumstances. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn.

¹We note that the Appellant asserts that a timely notice of appeal was filed, stating that the post-conviction court's order was filed on April 16, 2006, and that notice of appeal was filed on May 1, 2006. However, the record before us does not support the dates asserted by the Appellant.

Crim. App. 1995); *see also* *Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). Indeed, a

court charged with determining whether . . . pleas were ‘voluntary’ and ‘intelligent’ must look to various circumstantial factors, such as the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate that guilty pleas be voluntarily and intelligently made. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985) (citing *North Carolina v. Alford*, 400 U.S. at 31, 91 S. Ct. at 164).

To succeed in a challenge for ineffective assistance of counsel, the Appellant must demonstrate that counsel’s representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the Appellant must establish (1) deficient representation and (2) prejudice resulting from the deficiency. In the context of a guilty plea, to satisfy the second prong of *Strickland*, the Appellant must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. at 59, 106 S. Ct. at 370; *see also* *Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997). The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceeding. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel is dependant upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). “A trial court’s *findings of fact* underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise.” *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d)); *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, *conclusions of law*, are reviewed under a purely *de novo* standard, with no presumption of correctness. *Fields*, 40 S.W.3d at 458.

I. Preparation and Obtaining Discovery

As noted, the Appellant contends that trial counsel's performance was deficient because he failed to meet with her on a sufficient number of occasions to prepare the case and that he failed to obtain and review discovery materials with her. The Appellant testified that trial counsel only met with her on three occasions, when she came to court, and only conferred with her for approximately thirty minutes on each of these occasions. Moreover, she testified that she had to obtain her own discovery. However, trial counsel, while admitting that he spoke with the Appellant only on court days, testified that he had adequately conferred with the Appellant regarding her case and the State's plea offer. He further testified that he explained the Appellant's options to her and believed that she understood those options. Moreover, trial counsel also testified that he filed a discovery request and had reviewed the disclosed information with the Appellant.

We find nothing in the record to preponderate against the post-conviction court's finding that trial counsel's performance was not deficient with regard to his pre-trial representation of the Appellant. The court obviously accredited trial counsel's testimony in reaching its conclusion, and we will not reweigh or reevaluate it. *Henley*, 960 S.W.2d at 578-79. All questions involving the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley*, 960 S.W.2d at 578-79.

II. Misinforming the Appellant regarding her "Open Plea"

Next, the Appellant contends that trial counsel misinformed her "about the sentencing and enhancing process." Specifically, the Appellant argues that trial counsel did not adequately explain the consequences of entering an open guilty plea. She stated "there was a complete miscommunication or misunderstanding between the client and attorney resulting in a plea open to the indictment and a sentencing hearing instead of a trial." With regard to this issue, the post-conviction court found:

At her plea acceptance hearing, the [Appellant] . . . ans[w]ered that she had read and understood everything in her Petition to Enter Plea of Guilty, which included a recitation of the entire range of punishment for forgery. The [Appellant] was told to ask questijons [sic] if anything was said in the plea acceptance hearing that she did not fully understand, and she did interrupt and ask a question on one occasion.

. . . .

The [Appellant] was asked at her plea acceptance hearing if she knew what it meant to plead open, and she testified yes. She was asked if she had any complaint about the way and manner in which her attorneys had represented her, and she answered no. Finally, she testified at the end of the plea acceptance hearing that she

had no questions about anything said or done in the plea acceptance hearing and it was expressly found by the undersigned judge that she understood “both the direct and relevant collateral consequences of her plea.”

. . . .

The evidence at the hearing does not support the conclusion that counsel gave the [Appellant] any incorrect or misleading advise about alternative sentencing.

. . . .

There was no credible evidence that counsel gave the [Appellant] any inaccurate or inadequate advice about her range of punishment.

. . . .

There was no credible evidence at the evidence hearing on the PC that counsel gave the [Appellant] any inaccurate or inadequate advice concerning enhancement factors. As already pointed out, the [Appellant] testified that she understood what it meant to plead open and that she would not know what her sentences would be until the sentencing hearing. . . .

. . . .

There was no credible evidence that the [Appellant] had any confusion which had been created by any ineffectiveness in the representation that the [Appellant] was provided.

. . . .

The representation of the [Appellant] by [trial counsel] met an objective standard of reasonableness and was within a range of competence demanded of attorneys in criminal cases. There is no evidence that but for the inadequacy of that representation, the outcome of the [Appellant’s] original case would have been any different.

We are constrained to note that despite a notation in the post-conviction court’s order that the record would be supplemented with a transcript of the guilty plea submission hearing, the transcript is not included in the record before us. Moreover, absent from the record is a copy of the guilty plea agreement, which is critical to our review of the issues presented. The party seeking appellate review has a duty to prepare a record which conveys a fair, accurate, and complete account of what occurred with respect to the issues forming the basis of the appeal. *State v. Ballard*, 855

S.W.2d 557, 560 (Tenn. 1993); Tenn. R. App. P. 24(b). In the absence of an adequate record, the reviewing court must presume that the trial court's ruling is supported by sufficient evidence.

Following review of the record before us, we conclude that the evidence does not preponderate against the post-conviction court's finding that trial counsel provided competent representation. Trial counsel testified at the hearing that he explained all the available options to the Appellant, which included the State's offer of thirty-six years to be served at sixty percent. The Appellant declined the offer and opted to enter an "open plea," as provided by Rule 11(e)(1)(B), Tenn. R. Crim. P. The Appellant admitted that trial counsel explained to her that the trial court would determine the length of her sentence and the percentage of the sentence that she would be required to serve before release. Nothing indicates a "miscommunication" or a "misunderstanding" as to what was occurring in the case. Thus, as did the post-conviction court, we conclude that all the evidence supports a finding that the Appellant understood the consequences of entering an "open plea" to the indicted offenses. The Appellant has failed to establish any deficiency on trial counsel's part or that, but for any alleged deficiency, she would have proceeded to trial. Thus, our review of the record affirmatively demonstrates that the Appellant's guilty pleas were entered both knowingly and voluntarily. Accordingly, no relief is warranted.

CONCLUSION

Based upon the foregoing, the dismissal of the Appellant's post-conviction petition by the Bedford County Circuit Court is affirmed.

DAVID G. HAYES, JUDGE